

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

YEHUDA AVITAN,

Case No. C-10-03288 JCS

Plaintiff,

v.

ERIC HOLDER, ET AL.,

Defendants.

**AMENDED ORDER GRANTING
MOTION TO DISMISS IN PART AND
FOR SUMMARY JUDGMENT IN PART
AND DENYING PLAINTIFF'S CROSS
MOTION FOR SUMMARY JUDGMENT
[Docket No. 14]****I. INTRODUCTION¹**

Plaintiff Yehuda Avitan brings this action challenging the denial of his I-130 Immigrant Marriage Petition. Defendants bring a Motion to Dismiss in Part and for Summary Judgment in Part (“Defendants’ Motion”) seeking: 1) dismissal of Claims One, Two and Six under Rule 12(b)(6) of the Federal Rules of Civil Procedure; and 2) summary judgment on Claims Three, Four and Five under Rule 56 of the Federal Rules of Civil Procedure. Plaintiff brings a cross-motion for summary judgment (“Plaintiff’s Motion”). A hearing on the Motions was held on Friday, February 4, 2011 at 9:30 a.m. For the reasons stated below, Defendants’ Motion is GRANTED. Plaintiff’s Motion is DENIED.²

II. BACKGROUND**A. Facts**

On September 5, 2005, Lisa Claire Butler (“petitioner”) filed an I-130 Petitions for Alien Relative (“the First I-130 Petition”) on behalf of beneficiary Yehuda Avitan, Plaintiff in the instant

¹The Court files this Amended Order to correct typographical errors in the previously filed order. In all other respects, the Order is identical to Docket Number 19.

²The parties have consented to the jurisdiction of a United States Magistrate Judge pursuant to U.S.C. § 636(c).

1 action. See Certified Administrative Record (“CAR”) at 60. This petition was based on the
2 marriage on April 23, 2005 between Avitan and Ms. Butler. *Id.* at 52 . According to Plaintiff,
3 around the same time, on September 9, 2005, he filed an application for adjustment of status to
4 permanent residence (hereinafter, “Form I-485”). Complaint, ¶ 21. Plaintiff was paroled into the
5 United States on June 19, 2007. *Id.*, ¶ 23.

6 Plaintiff alleges that on June 13, 2006, Avitan and Ms. Butler attended an interview at the
7 office of U.S. Citizenship and Immigration Services (“USCIS”) in Salt Lake City, Utah in
8 connection with the First I-130 Petition. *Id.*, ¶ 22. According to Plaintiff, “[a]fter the interview, the
9 adjudicating officer, Mark Titus . . . informed [Avitan] and Ms. Butler that everything in the I-130
10 petition looked fine, but [Avitan] and Ms. Butler needed to submit the co-sponsor’s most recent tax
11 returns . . . [and] an affidavit from [Avitan’s] brother to the bona fides of the marriage.” *Id.*, ¶ 22.
12 Plaintiff alleges that this evidence was promptly provided to Officer Titus. *Id.*

13 On May 29, 2008,³ Avitan and Ms. Butler were interviewed a second time in connection with
14 the First I-130 Petition. *Id.*, ¶ 24; *see also* CAR at 57-60. Ms. Butler and Avitan were interviewed
15 separately, under oath. CAR at 24; Complaint, ¶ 25. At the interview, Ms. Butler signed a sworn
16 statement that includes the following exchange between Ms. Butler and Officer Titus:

17 Q. Are you and your husband living together in the same home?
A. No.

18 Q. Have you ever lived together in the same home.
A. No.

19 Q. When and where were you and your husband married?
A. Elvis Chapel in Las Vegas, NV on 4-23-2005.

20 Q. How long did you know your husband before you were married?
A. About a month or 2 months.

21 Q. Who arranged the marriage?
A. We both did.

22 Q. Were you paid any money prior to the marriage or after the marriage, by your husband or any of his family members?
A. During the last 4 years it has been about \$4,000.00 and the cable bill every month.

23 Q. Was this money given to you to enter into a Sham Marriage to circumvent immigration law?
A. Yeah.

24 Q. Were you made any other promises or offered any other money?
A. Yeah I was going to be given an additional \$1000.00.

25 Q. Did you know it was a violation of law to enter into a sham marriage?
A. Yes.

³Although Plaintiff alleges that the interview took place on May 28, 2008, the administrative record indicates that it took place on May 29, 2008.

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1 Q. Why did you get married to this person when you knew it was a violation of law?
2 A. I care about him and thought he could make something for himself, because he does work
hard.
3 Q. Are you currently living with your husband in a valid marital union?
4 A. No.
5 Q. Have you and your husband ever consummated your marital union?
A. Once before we were married but not since the marriage.
Q. Since I have explained all the information to you about a sham marriage[,] [w]hat would you
like to do with the I-130 relative petition that you submitted for your claimed husband?
A. Withdraw the application.

6 . . .
7

8 CAR at 58-59. Ms. Butler also signed a Withdrawal Form, and the First I-130 Petition was denied
9 on the same day. CAR at 57, 60. In his Complaint, Plaintiff alleges that Ms. Butler signed the
10 statement and withdrawal form only because Officer Titus threatened her with imprisonment and
11 "she felt that she had no choice but to sign the statement prepared entirely by Officer Titus."
12 Complaint, ¶¶ 27-28.

13 On June 10, 2008, USCIS placed Avitan into removal proceedings for having overstayed his
14 visitor's visa issued on November 13, 2004. Complaint ¶ 29.

15 On November 28, 2008, Ms. Butler filed a second I-130 petition on Avitan's behalf ("the
16 Second I-130 Petition"). CAR at 50-51; Complaint ¶ 30.

17 On April 28, 2009, USCIS interviewed Avitan and Ms. Butler under oath in conjunction with
18 the Second I-130 Petition. Complaint ¶ 30; CAR at 2, 24. On May 5, 2009, USCIS denied the
19 Second I-130 Petition after concluding that the marriage was entered into for the purpose of evading
20 immigration laws and obtaining immigration benefits for Avitan. CAR at 23-27. The written
21 decision that accompanied the denial states, in part, as follows:

22 During the interview, you and the beneficiary were both asked if you lived together, both of
you said no. You both testified that you maintain separate residences. . . .
23 . . .
24

25 The officer asked you where you were residing when you initially met the beneficiary. You
stated that you were residing at 6101 "something road" in Albuquerque, New Mexico. You
were further asked if the beneficiary has spent the night at that residence. You stated no.
26 You were then asked if he has visited you at the address. You stated that "he came in but not
spent the night." When the beneficiary was asked the same question, he responded that he
27 has never been at your New Mexico residence.
28

1 You confirmed that you previously lived at 582 N. Riverside Drive residence at Salt Lake
2 City, Utah with your son from November 2006 through September 2008. You stated that the
3 beneficiary would “just come visit” and he did not spend the night here. You further stated
4 that your relationship at this point was only platonic and you and the beneficiary were
friends. When the beneficiary was asked if he ever spent the night at the residence, he stated
that he at least spent the night “involving an amount under five times.” . . .

5 . . .

6 The officer asked if your parents are aware of your marriage with the beneficiary. You stated
7 that they are not aware and you further stated that “I don’t want them in my life,” but you
8 stated your sister is aware of your marriage to the beneficiary. When the beneficiary was
asked the same question, he stated that your parents knew about the marriage. When the
beneficiary was confronted with the discrepancy, he stated, “that’s what she . . . told me
awhile ago.”

9 . . .

10 CAR at 24-25.

11 On September 13, 2009, Ms. Butler filed a third I-130 petition on Avitan’s behalf (“the Third
12 I-130 Petition”), along with an affidavit stating that she had agreed to withdraw the First I-30
13 Petition only because Officer Titus threatened her during the interview, stating, in part, as follows:

14 My name is Lisa Clair Butler, I am a United States Citizen and I am married to
15 Yehuda Avitan . . . I am making this affidavit as part of my petition for an immigrant visa
for him, as a way or retracting a statement which I was forced to sign in May 2008.

16 My husband and I were married in April of 2005 and shortly thereafter, I filed a visa
17 petition on his behalf. After filing, we were interviewed at the immigration offices in Salt
18 Lake City. Although we were having problems in our marriage and we had separated, we
19 were trying to work out our problems and I wanted to be able to settle the issue of his legal
status here to take that stress out of the equation. I was so excited when we got the notice to
return in 2008 that I eagerly prepared all the documentation necessary and happily went to
the interview. . . .

20 . . . I was called into the room alone with the officer, Mark Titus. His first remark to me was,
21 “I know your marriage is a sham because Israelis don’t marry single women with children
22 because those women are dirty.” . . . He told me from the outset that I was going to sign a
statement indicating that I entered my marriage for money and to get immigration status for
Udi, or he would see to it that I was going to lose my child.

23 Because his accusations were untrue, I fought back. I told him that was not the case,
24 that Udi and I married for love and with the intention of building our lives together forever.
Officer Titus told me that Udi was dangerous, and that I could be killed, because he has an
uncle who is rich and powerful, and has ties to the Mafia. That was not true, but he kept
badgering me and threatening to put me in jail so that I would lose my son. I asked to leave,
because I didn’t want to be there, and I asked to go talk to my husband, but he would not let
me.

27 His threats finally broke me. . . . I could see that this officer was determined to ruin
28 me, and I finally gave in. . . .

1 The statement I filed was written by him, and he made it up, and twisted my words to
2 suit his purpose. For most of the time we have been together, I have supported my husband
3 financially. He didn't have his work authorization for some time, and the only money he
4 ever was able to contribute to our household was money his brother or sister would give him.
Later, he started driving trucks for his brother and we would be separated for weeks at a
time, which was also hard on the marriage, but he was more able to contribute to our
household financially.

5 But I was never paid by my husband to marry him so that he could obtain his
immigration papers. We both entered this marriage with the intention of sharing our lives
6 together. . . .

7 *Id.* at 13-14 (6/5/2009 Affidavit).

8 On November 24, 2009, in response to a notice of interview, Avitan appeared for an
9 interview but Ms. Butler did not. CAR at 4; Complaint ¶ 37. Avitan claimed that Ms. Butler was ill
10 with the swine flu and asked that the interview be rescheduled, but the request was denied. CAR at
11 4; Complaint ¶ 37. According to USCIS, at the November 24, 2009 interview Avitan refused to
12 answer any questions about his marriage to Ms. Butler because he did not have an attorney present,
13 and no “further evidence to substantiate [Ms. Butler’s] reason for not coming to the interview” was
14 submitted after the interview. CAR at 4.

15 On January 5, 2010, USCIS denied the Third I-130 Petition. CAR at 1. The attached written
16 decision described Ms. Butler’s earlier I-130 petitions and the reasons for their denial, citing the
17 withdrawal of the First I-130 Petition and the substantive finding in connection with the Second I-
18 130 Petition that the marriage between Avitan and Ms. Butler was entered into for the purpose of
19 evading immigration laws and obtaining immigration benefits for Avitan. CAR at 4-5. The decision
20 went on to state that in light of the earlier denials, Ms. Butler bore a “heavy burden” to explain the
21 circumstances of the withdrawal of the First I-130 and that she also was required to submit evidence
22 of the bona fides of her relationship with Avitan. CAR at 4. USCIS found that this burden was not
23 met, stating as follows:

24 In the instant case, you submitted an affidavit stating that you were forced to sign the
25 statement prepared by the government official and now you are retracting your statement.
According to 8 Code of Federal Regulations, Part 103.2(b)(6), a withdrawal may not be
26 retracted. In addition, you and the beneficiary did not submit any additional evidence
refuting the prior findings of the [USCIS]. You and the beneficiary also did not provide any
new evidence supporting the bona fides of the marriage.

27 The record supports the finding that the beneficiary’s marriage was a sham marriage entered
28

1 into to evade immigration laws. You have not submitted any evidence indicating the contrary.

2 The record has established that the previous visa petitions you filed on behalf of the
3 beneficiary and the sworn statements constitute sufficient substantial and probative evidence
4 to support a finding that the beneficiary is an alien who falls within the purview of Section
5 204(c) of the Act [8 U.S.C. § 1154(c)].⁴ As the petitioner had entered into a marriage with
6 Yehuda Avitan for the sole purpose to obtain immigration benefits, no subsequent visa
7 petition filed on his behalf may be approved.
8

9 *Id.*

10 On July 27, 2010, Plaintiff instituted this lawsuit by filing the Complaint.

11 **B. The Complaint**

12 In the Complaint, Plaintiff asserts the following claims:

13 **Claim One:** Violation of Procedural Due Process under the Constitution “by failing to
14 provide Plaintiff with adequate opportunity to rebut the derogatory information contained in
15 the administrative record; and by not allowing Plaintiff to present and cross examine
16 witnesses and present evidence.” Complaint ¶ 43. As a remedy for this alleged violation,
17 Plaintiff asks the Court to “provide him with a de novo evidentiary hearing before the
18 Immigration Judge to determine the validity of Defendant’s decision to deny his I-130
19 petition.” *Id.*

20 **Claim Two:** Violation of Procedural Due Process under Immigration and Nationality Act for
21 the same reasons cited in support of Claim One. Complaint ¶ 45. Plaintiff seeks a de novo
22 evidentiary hearing on this claim as well.

23 ⁴Section 1154(c) provides as follows:
24

25 Limitation on orphan petitions approved for a single petitioner; prohibition against approval in
26 cases of marriages entered into in order to evade immigration laws; restriction on future entry
27 of aliens involved with marriage fraud[.]

28 Notwithstanding the provisions of subsection (b) of this section no petition shall be approved
if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative
or preference status as the spouse of a citizen of the United States or the spouse of an alien
lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney
General to have been entered into for the purpose of evading the immigration laws, or (2) the
Attorney General has determined that the alien has attempted or conspired to enter into a
marriage for the purpose of evading the immigration laws.

1 Claim Three: Violation of Administrative Procedures Act based on allegation that denial of
2 Plaintiff's I-130 petition "is not supported by the record and is therefore arbitrary and
3 capricious." *Id.* ¶ 47.

4 Claim Four: Injunctive Relief based on allegation that "[a] bona fide dispute has arisen
5 between Plaintiff and the Defendant regarding the factual and legal sufficiency of the
6 Defendant's decision to deny Plaintiff's I-130 petition, and Plaintiff has been prejudiced by
7 the Defendant's decision." *Id.* ¶ 50.

8 Claim Five: Declaratory Relief under 28 U.S.C. § 2201 based on same allegation as Claim
9 Four.

10 Claim Six: Declaration that 8 C.F.R. § 204.1 and 8 C.F.R. § 1204.1, as interpreted by the
11 Department of Homeland Security ("DHS"), are ultra vires, to the extent that they give DHS
12 exclusive authority to make a marriage fraud determination and adjudicate an I-130 petition
13 without allowing an alien to examine the evidence or cross-examine witnesses, in violation
14 of due process and "in direct conflict with Immigration and Nationality Act ("INA") §
15 240(b)(4), 8 U.S.C. § 1229a(b)(4) which provides due process rights to all aliens in removal
16 proceedings." Complaint ¶ 55.

17 Claim Seven (erroneously entitled "Claim Six" in Complaint): Attorneys' Fees and Costs
18 pursuant to the Equal Access to Justice Act ("EAJA") 28 U.S.C. § 2412.

19 **C. The Motions**

20 Defendants assert that pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure,
21 Claims One, Two and Six fail to state a claim. In particular, as to Claims One and Two, based on
22 the alleged denial of due process, Defendants assert that Plaintiff fails to state a claim because: 1) the
23 requested relief on these claims – a de novo hearing before an immigration judge – is not available
24 because immigration judges do not have jurisdiction to adjudicate visa petitions; and 2) Plaintiff is
25 not entitled to a formal adjudicatory hearing on his visa petition but rather, merely to adjudication by
26 the USCIS pursuant to its regulations, which Plaintiff received. Defendants' Motion at 6-9.
27 Defendants further assert that Claim Six fails to state a claim because USCIS's authority over
28 marriage determinations derives from statute and therefore is not ultra vires.

1 Defendants seeks summary judgment as to Claims Three, Four and Five, based on the
2 allegation that the denial of the Third I-130 Petition was arbitrary, capricious and lacked a basis in
3 fact and law, on the ground that neither Ms. Butler nor Avitan offered evidence to substantiate their
4 marriage and there is ample evidence in the record to support the finding that the marriage was a
5 sham. *Id.* at 12-17.

6 Finally, Defendants assert that in any event, Defendant Eric Holder, Attorney General of the
7 United States, should be dismissed as to all of Plaintiff's claims because he is not a proper defendant
8 under the Homeland Security Act of 2002, which abolished the Immigration and Naturalization
9 Service ("INS") and transferred the power to adjudicate I-130 petitions from the Commissioner of
10 the INS and the Attorney General to the Director of USCIS, under the purview of the Secretary of
11 Homeland Security. *Id.* at 1 n. 1 (citing Pub. Law No. 107-296, §§ 451(b) & 471).

12 In his opposition and cross-motion ("Plaintiff's Motion"), Plaintiff asserts that he is entitled
13 to summary judgment on his "complaint for declaratory and injunctive relief" on the grounds that: 1) the
14 District Director of the USCIS erred in denying the Third I-130 Petition by giving "conclusive
15 weight" to the determinations made in the prior proceedings to conclude that Avitan was subject to
16 INA § 204(c) [8 U.S.C. § 1154(c)]; 2) a "harmonious reading" of the statutory provisions governing
17 immigrant visa petitions and removal proceedings, codified at 8 U.S.C. §§ 1154(a)(1)(A)(i) and
18 1229a(b)(4), respectively, entitle Plaintiff to challenge the marriage fraud finding made on his I-130
19 petition in the removal proceedings that are underway in the immigration court, subject to the same
20 rights to present evidence and examine witnesses that govern removal proceedings; 3) the balancing
21 test for determining the administrative procedures necessary to ensure due process under the U.S.
22 Constitution, set forth in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), also requires that an alien
23 be allowed to challenge an I-130 visa determination in removal proceedings.⁵

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27 ⁵Plaintiff does not object to dismissal of Defendant Eric Holder, who is dismissed from the case
28 on the basis that he is not a proper defendant in light of the transfer of authority to make visa
determinations from the INS to the Director of USCIS, as discussed above.

1 **D. Statutory and Regulatory Framework**

2 Adjustment of status is governed by section 245 of the Immigration and Nationality Act
3 (“INA”), 8 U.S.C. § 1255. Section 1255(a) states that:

4 [t]he status of an alien who was inspected and admitted or paroled into
5 the United States. . . may be adjusted by the Attorney General, in his
6 discretion and under such regulations as he may prescribe, to that of an
7 alien lawfully admitted for permanent residence if (1) the alien makes
8 an application for such adjustment, (2) the alien is eligible to receive
9 an immigrant visa and is admissible to the United States for permanent
10 residence, and (3) an immigrant visa is immediately available to him at
11 the time his application is filed.

12 8 U.S.C. § 1255(a). Although the text of section 1255 expressly authorizes the Attorney General to
13 adjust status, that authority is now vested in the Secretary of Homeland Security by virtue of the
14 Homeland Security Act of 2002, 6 U.S.C. §§ 101 *et seq.* 6 U.S.C. § 271(b); *see also Clark v.*
15 *Martinez*, 543 U.S. 371, 375 n.5 (2005) (noting that authority formerly exercised by the Attorney
16 General and the Immigration and Naturalization Service (“INS”) under similar provision of the INA
17 was transferred to the Secretary of Homeland Security and divisions of that Department, including
18 USCIS, by the Homeland Security Act). As a result of this transfer, the authority to adjudicate
19 adjustment of status applications is now vested in the Director of USCIS. *Id.*; 8 C.F.R. § 245.2(a)
20 (granting USCIS jurisdiction to adjudicate adjustment of status applications). Similarly, the
21 authority to adjudicate I-130 visa petitions was transferred from the INS (and the Attorney General)
22 to the Director of USCIS. 6 U.S.C. § 271(b); 8 C.F.R. § 204.1 & 204.2.

23 The application for adjustment of status to that of lawful permanent resident is USCIS Form
24 I-485. 8 C.F.R. § 299.1. To be eligible for adjustment of status on the basis of a family relationship
25 to a citizen or a lawful permanent resident, an applicant must have an approved immigrant visa
26 petition, the Petition for Alien Relative (Form I-130), in which the petitioner asks the USCIS to
27 confirm the family relationship. *See* 8 U.S.C. § 1255(a); 8 C.F.R. §§ 204.1(a)(1), 204.2. *See* 8
28 U.S.C. §§ 1154(a)(1)(A)(i) and (b); 8 C.F.R. § 204.1(a). In visa petition proceedings, such as the
29 adjudication of an I-130 by USCIS, the burden of proving eligibility for the benefit sought
30 is on the petitioner. 8 U.S.C. § 1361.

31 A marriage entered into for the purpose of circumventing immigration laws is considered

1 a fraudulent or sham marriage and is not recognized as enabling an alien spouse to obtain
2 immigration benefits. *Vasquez v. Holder*, 602 F.3d 1003, 1014 n.11 (9th Cir. 2010) (citations
3 omitted). In particular, 8 U.S.C. § 1154(c) provides in pertinent part:

4 [N]o petition shall be approved if (1) the alien has previously been accorded, or has sought to
5 be accorded, an immediate relative or preference status as the spouse of a citizen of the
6 United States or the spouse of an alien lawfully admitted for permanent residence, by reason
7 of a marriage determined by the Attorney General to have been entered into for the purpose
of evading the immigration laws, or (2) the Attorney General has determined that the alien
has attempted or conspired to enter into a marriage for the purpose of evading the
immigration laws.

8 8 U.S.C. § 1154(c); *see also* 8 C.F.R. § 204.2(a)(1)(ii). Thus, where there is “substantial and
9 probative” evidence of such an attempt or conspiracy “contained in the alien’s file,” the petition
10 must be denied, “regardless of whether that alien received a benefit through the attempt or
11 conspiracy.” C.F.R. § 204.2(a)(1)(ii). Further, once an alien is found to have engaged in marriage
12 fraud, § 1154(c) forecloses the possibility of any subsequent visa petition ever being approved on
13 behalf of the alien. *See Ghaly v. Immigration & Naturalization Serv.*, 48 F.3d 1426, 1436 (7th Cir.
14 1995) (acknowledging that § 1154(c) is a “harsh law” because, an alien “can never become a citizen
15 of the United States or even reside permanently in this country” once a finding has been made that
16 the alien entered or attempted to enter into a sham marriage). A prior admission of marriage fraud
17 made in conjunction with a withdrawal of an earlier I-130 petition can be overcome by new
18 evidence. *Matter of Laureano*, 19 I & N. Dec. 1, at *3-4 (1983) (affirming denial of I-130 petition
19 after earlier petition was withdrawn and petitioner admitted that the earlier petition was based on a
20 fraudulent marriage). However, a petitioner seeking adjustment of status under these circumstances
21 bears a “heavy burden” to establish that a marriage is legitimate. *Id.* at * 4.

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1 **III. ANALYSIS**2 **A. Legal Standard Under Rule 56⁶**

3 Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories,
 4 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to
 5 any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ.
 6 P. 56(c). Summary judgment must be supported by “facts as would be admissible in evidence.”
 7 Fed. R. Civ. P. 56(e). In order to prevail, a party moving for summary judgment must show the
 8 absence of a genuine issue of material fact with respect to an essential element of the non-moving
 9 party’s claim, or to a defense on which the non-moving party will bear the burden of persuasion at
 10 trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further, “*Celotex* requires that for issues
 11 on which the movant would bear the burden of proof at trial, that party must show affirmatively the
 12 absence of a genuine issue of material fact,” that is, “that, on all the essential elements of its case on
 13 which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party.”
 14 *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993). Once the movant has made this
 15 showing, the burden then shifts to the party opposing summary judgment to designate “specific facts
 16 showing there is a genuine issue for trial.” *Celotex*, 477 U.S. at 323. On summary judgment, the
 17 court draws all reasonable factual inferences in favor of the non-movant. *Anderson v. Liberty Lobby*
 18 Inc., 477 U.S. 242, 255 (1986).

19 **B. Claims One and Two**

20 In Claims One and Two, Plaintiff alleges that his right to procedural due process under the
 21 INA and the U.S. Constitution were violated because he was not given an opportunity to rebut
 22 evidence in the record or to present and cross-examine witnesses in connection with the Third I-130
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 24

25 ⁶Although Defendants requested dismissal of Claims One, Two and Six under Rule 12(b)(6) of
 26 the Federal Rules of Civil Procedure rather than under Rule 56(c), the parties stipulated at oral argument
 27 that the Court should treat Defendants’ Motion as a summary judgment motion as to all of Plaintiff’s
 28 claims. The Court notes that the two cases cited by Defendants in support of their request for dismissal
 of Claims One, Two, and Six, were, in fact, decided under the summary judgment standard. See
 Garcia-Lopez v. Aytes, 2010 WL 2991720 , at *4 (N.D. Cal. July 28, 2010); *Dhillon v. Mayorkas*, 2010
 WL 3325630, at *4 (N.D. Cal. Aug. 20, 2010).

1 Petition.⁷ At a minimum, Plaintiff asserts, he should have been permitted to reschedule the interview
 2 that was set for November 24, 2009. As relief on these claims, Plaintiff requests a de novo hearing
 3 before an immigration judge, including an opportunity to present evidence and cross-examine
 4 witnesses, to determine the validity of USCIS's denial of his I-130 petition. The Court finds that
 5 these claims fail, as a matter of law, because Plaintiff has not established that the process afforded
 6 him in connection with his Third I-130 Petition was insufficient under the INA or the Constitution.⁸

7 First, Plaintiff has not pointed to any statutory provision or regulation that affords a
 8 petitioner the right to a formal hearing in which evidence may be presented and witnesses cross-
 9 examined. To the contrary, the statutory provisions Congress has enacted for visa determinations do
 10 not require formal adjudicatory hearings for visa petitions. *See* 8 U.S.C. §§ 1153 and 1154;
 11 *Garcia-Lopez v. Aytes*, 2010 WL 2991720 , at *4 (N.D. Cal. July 28, 2010) ("[T]here is no
 12 indication that Section 1154 triggers the formal adjudication procedures set forth in the [APA].);
 13 *Dhillon v. Mayorkas*, 2010 WL 3325630, at *4 (N.D. Cal. Aug. 20, 2010) (same) (citing
 14 *Garcia-Lopez*, 2010 WL 2991720, at *4). Rather, as a potential visa beneficiary, the process to
 15 which Plaintiff was entitled involved the submission of an I-130 petition by petitioner and
 16 subsequent adjudication of that petition by USCIS pursuant to its regulations. *See* 8 C.F.R. § 103.2.

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 18 ⁷At oral argument, Plaintiff stipulated that his due process claims were based on USCIS's denial
 19 of the *Third* I-130 Petition only.

20 ⁸Defendants also seek dismissal of Claims One and Two on the grounds that the relief requested
 21 by Plaintiff, that is, a de novo evidentiary hearing before an immigration judge, is not available in
 22 connection with an I-130 petition. Defendants are correct that immigration judges do not have the
 23 authority to adjudicate I-130 petitions. *See Freeman v. Gonzales*, 444 F.3d 1031, 1043 n. 19 (9th Cir.
 24 2006)(citing *Dielmann v. INS*, 34 F.3d 851, 853 (9th Cir.1994) for the proposition that "the authority
 25 to adjudicate immediate relative preference petitions properly rests with the Attorney General (who has,
 26 in turn, delegated it to the district directors), and not with the BIA or immigration judge"); *Dhillon v.*
27 Mayorkas, 2010 WL 3325630 (N.D. Cal. Aug. 20, 2010) (Chen, J.) (acknowledging that an immigration
 28 judge "does not have the authority to review a USCIS finding regarding a fraudulent marriage"). Nor
 is the Court persuaded by Plaintiff's assertion that the "structure of the removal proceedings" support
 the conclusion that a marriage fraud determination by the USCIS is reviewable in removal proceedings,
 which is not supported by any authority. Nonetheless, courts generally do not dismiss a claim on the
 basis that the remedy requested is unavailable unless *no* relief can be granted. *See Massey v. Banning*
Unified School Dist., 256 F.Supp.2d 1090, 1092 (C.D.Cal., 2003) (citing *Doe v. United States Dept. of*
Justice, 753 F.2d 1092, 1104 (D.C.Cir.1985) and *Doss v. South Central Bell Telephone Co.*, 834 F.2d
 421, 425 (5th Cir.1987) (demand for improper remedy not fatal if claim shows plaintiff entitled to
 different form of relief)). As Defendants have not established that there is no form of relief that could
 be granted on these claims, the Court declines to dismiss Claims One and Two on this basis.

1 USCIS was required make its decision based only on the evidence in the record disclosed to the
2 petitioner and to provide petitioner with a basis for any denial in writing and an opportunity to
3 appeal the decision. *See* 8 C.F.R. § 103.3(a)(1)(i). USCIS fulfilled its duty relative to the I-130
4 petitions by considering evidence submitted by petitioner and Plaintiff, interviewing petitioner and
5 Plaintiff, issuing written decisions on the petitions based on the evidence in the record, and
6 providing the parties the opportunity to inspect the evidence in the record and/or appeal the decision.
7 *See* 8 C.F.R. §§ 103.2(b)(1), (16) and 103.3(a)(1)(i). Thus, Plaintiff was not denied any process to
8 which he was entitled under any statute, including the INA.

9 Second, the Court concludes that Plaintiff's claims also fail to the extent they are based on
10 his Constitutional due process rights. As a preliminary matter, it is not clear that there is any
11 constitutionally protected liberty interest at stake here. *See Dhillon*, 2010 WL at * 4 (questioning
12 whether plaintiffs who challenged denial of visa petition had a constitutionally protected "liberty
13 interest" given that adjustment of status is discretionary). Assuming there is one, however,
14 Plaintiff's constitutional due process claim is an as-applied challenge that is governed by *Mathews v.*
15 *Eldridge*, 424 U.S. 319, 335 (1976). In *Mathews*, the Supreme Court explained that "due process is
16 flexible and calls for such procedural protections as the particular situation demands." *Id.* at 335
17 (citations omitted). Thus, courts are instructed to consider the following factors:

18 First, the private interest that will be affected by the official action; second, the risk of an
19 erroneous deprivation of such interest through the procedures used, and the probable value, if
20 any, of additional or substitute procedural safeguards; and finally, the Government's interest,
including the function involved and the fiscal and administrative burdens that the additional
or substitute procedural requirement would entail.

21 *Id.* In this case, the Court finds that the second factor is dispositive because nothing in the
22 administrative record or in the record of this case suggests that additional procedural protections
23 would have given rise to a different result. In particular, Plaintiff fails to point to any evidence, or
24 even offer an explanation, for the discrepancies between his own testimony and that of Ms. Butler in
25 the April 28, 2009 interview, or for his failure to bring an attorney to the interview scheduled for
26 November 24, 2009, when he might have addressed these discrepancies but instead refused to
27 answer any questions. Nor is there any evidence in the record that the petitioner submitted any
28 evidence of her illness after she failed to appear or that she requested another opportunity to be

1 interviewed. Further, Plaintiff has not pointed to any evidence suggesting that if the November 24,
 2 2009 interview had been rescheduled, either Plaintiff or the petitioner would have offered testimony
 3 that would have led to a different result. Finally, Plaintiff has not pointed to any specific documents
 4 suggesting that additional procedural safeguards would have led to a different result.

5 Accordingly, the Court concludes that Defendants are entitled to summary judgment on
 6 Claims One and Two.

7 **C. Claim Six**

8 In Claim Six, Plaintiff seeks a declaration that two regulations relating to the adjudication of
 9 I-130 petitions – 8 C.F.R. § 204.1 and 8 C.F.R. § 1204.1⁹ – are *ultra vires* to the extent DHS
 10 interprets these regulations as giving it authority to decide such petitions without conducting a
 11 formal hearing or affording an opportunity for the petitioner to present evidence and cross-examine
 12 witnesses, in conflict with the INA provision governing removal proceedings. 8 U.S.C. §
 13 1229a(b)(4). The Court finds that Defendants are entitled to summary judgment on this claim.

14 First, the authority to make marriage fraud determinations addressed in the regulations
 15 Plaintiff challenges derives from statute. In particular, under the Homeland Security Act, Congress
 16 gave USCIS the authority to “establish the policies for performing such functions as are transferred
 17 to the Director by this section or this chapter or otherwise vested in the Director by law[.]” 6 U.S.C.
 18 §271(a)(3). Among the functions that were transferred to the Director of USCIS was the
 19 adjudication of immigrant visa petitions, a function that was transferred from the Commissioner of
 20 the former INS. 6 U.S.C. § 271(b)(1). This function includes the authority to make marriage fraud
 21 determinations under 8 U.S.C. § 1154(c). Pursuant to this statute, DHS has promulgated regulations
 22 at 8 C.F.R. §§ 204.1 and 204.2 outlining USCIS procedures for making marriage fraud
 23 determinations.

24
 25
 26 ⁹As noted by Defendants, 8 C.F.R. § 1204.1 applies only to determinations of whether a
 27 petitioner has established eligibility for the “bona fide marriage exemption,” which is only applicable
 28 to marriages that occur during the pendency of removal proceedings. 8 C.F.R. § 204.2(a)(1)(iii).
 Plaintiff and petitioner married on November 13, 2004, and Plaintiff was placed into removal
 proceedings on June 10, 2008. Section 1204.1 thus does not apply here.

1 Second, Plaintiff's reliance on statutory provisions governing *removal* proceedings is
2 misplaced because removal proceedings are a separate process governed by different statutory
3 provisions. See *Garcia-Lopez*, 2010 WL 2991720 , at *3-4 (rejecting claim that 8 U.S.C. § 1229a
4 permits cross-examination in visa petition process); *Dhillon*, 2010 WL 3325630, at *4
5 (distinguishing I-130 petition process, in which visa applicant or petitioner can review derogatory
6 information, from removal process, which allows the actual examination of evidence and witnesses)
7 (citing *Garcia-Lopez*, 2010 WL 2991720, at *4). USCIS District Directors decide spousal visa
8 petitions, such as the one at issue here. That process is governed by 8 U.S.C. § 1154(c) and 8 C.F.R.
9 §§ 204.1 and 204.2. Removal proceedings, on the other hand, are overseen by immigration judges
10 and are governed by 8 U.S.C. § 1229a and 8 C.F.R. § 236.1. Therefore, Plaintiff's claim fails.

11 **D. Claims Three, Four and Five**

12 In Claims Three, Four and Five, Plaintiff challenges the decision of USCIS denying the I-130
13 petitions on the merits.¹⁰ The parties stipulated at oral argument that the applicable standard on all
14 three claims is the standard that governs Claim Three, based on Defendants' alleged violation of the
15 Administrative Procedures Act, and the Court agrees. *See Ghafoori v. Napolitano*, 2010 WL
16 1838915, at *3 n.7 (N.D. Cal. May 4, 2010) (Henderson, J.) (applying APA standard of review to
17 claims brought under APA and Default Judgment Act, 28 U.S.C. § 2201, on the basis that relief
18 sought on both claims was the same, citing *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507
19 (9th Cir.1997)).

20 **1. Legal Standard**

21 The Administrative Procedure Act ("APA") subjects to judicial review any "final agency
22 action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Under the APA, a
23 reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions
24 found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
25 law." *Id.* § 706(2)(A). This "standard of review is a narrow one," demanding a "searching and
26 careful" inquiry that assesses "whether the decision was based on a consideration of the relevant

27 ¹⁰To the extent these claims also appear to be based on alleged procedural deficiencies, the
28 claims are dismissed for the reasons stated above.

1 factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton Park,*
 2 *Inc. v. Volpe*, 401 U.S. 402, 416 (1971), overruled on other grounds by *Califano v. Sanders*, 430
 3 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).¹¹ “The court is not empowered to substitute its
 4 judgment for that of the agency.” *Id.* Nor is the court required to resolve any facts where relief is
 5 sought under the APA. *Occidental Engineering Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).
 6 Rather, the court’s task is to determine whether the evidence in the administrative record permitted
 7 the agency to make the decision it did. *Id.* A court should uphold an agency decision even if it is
 8 “of less than ideal clarity,” so long as “the agency’s path may reasonably be discerned.”
 9 *Northwestern Motorcycle Ass’n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1478 (9th Cir. 1994)
 10 (citing *Motor Vehicle Mfr. Ass’n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983)). The
 11 agency need only show “a rational connection between the facts found and the choices made.”
 12 *Motor Vehicle Mfr. Ass’n*, 463 U.S. at 43 (citation omitted). “[R]eview is especially deferential in
 13 the context of immigration policy.” *Jang v. Reno*, 113 F.3d 1074, 1077 (9th Cir. 1997).

14 **2. Application of Legal Standard**

15 As discussed above, under 8 C.F.R. § 204.2(a)(1)(ii), the USCIS may deny an I-130 petition
 16 where there is “substantial and probative evidence” of marriage fraud. Thus, Defendants are entitled
 17 to summary judgment on these claims as long as the USCIS’s determination that this standard was
 18 met is not arbitrary and capricious. Having carefully reviewed the evidence in the record, the Court
 19 finds that the evidence in the record was sufficient to support the agency’s decision and therefore,
 20 that Defendants are entitled to summary judgment on Claims Three, Four and Five.

21 First, the Court rejects Plaintiff’s assertion that USCIS gave “conclusive weight” to the
 22 denial of the First I-130 Petition, based on Ms. Claire’s admission and withdrawal of that petition.
 23 Rather, a review of the written decision issued in support of the final I-130 petition reveals that
 24

25 ¹¹The Court rejects Plaintiff’s contention that the relevant standard is the “substantial evidence”
 26 standard. As the Court explained in *Citizens to Preserve Overton Park*, the “substantial evidence”
 27 standard applies to review of agency action only under narrow circumstances, in particular, in cases
 28 where the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure
 Act itself . . . or when the agency action is based on a public adjudicatory hearing.” 401 U.S. at 414.
 As the agency decision at issue here does not fall within this narrow category of decisions, the
 substantial evidence standard does not apply.

1 USCIS did not rely solely on the first denial (although that was the reason for the denial) but instead,
2 cited other evidence supporting its decision as well, including the following:

- 3 • petitioner did not appear for the final I-130 interview, purportedly because she had swine flu,
4 but Plaintiff offered no medical evidence or other documentation substantiating petitioner's
illness;
- 5 • Plaintiff could not be interviewed at the final scheduled interview because he arrived without
counsel and refused to answer questions concerning his marriage without counsel present;
- 6 • After petitioner's first two I-130 petitions were denied, petitioner did not provide any new
evidence supporting the bona fides of the marriage;
- 7 • In their April 23, 2009 interview, Plaintiff and petitioner, in the course of separate
interviews, gave several inconsistent answers, as set forth above. In addition, in that
interview, Plaintiff and petitioner both testified that Plaintiff was involved in a "physical"
and "emotional" relationship with another woman and that Plaintiff and petitioner's
relationship was no longer romantic.

11 CAR 1-5.

12 Second, the Court rejects Plaintiff's reliance on *Matter of Tawfik*, 20 I & N. Dec. 166, 170
13 (BIA 1990) in support of his assertion that USCIS gave undue weight to the denial of the First I-130
14 Petition and petitioner's admission in connection with that petition. In *Tawfik*, the Board of
15 Immigration Appeals ("BIA") held that where a prior visa petition had been denied based, in part, on
16 evidence that a marriage was entered into to evade immigration laws but where no actual finding had
17 been made of fraudulent marriage, the prior decision was not entitled to conclusive effect. Rather,
18 an independent decision was to be made based on a consideration of the entire record, including the
19 evidence in the record relating to the earlier denial. *Id.* Here, the written decision issued by the
20 USCIS in support of its denial of the Third I-130 petition shows that the USCIS did not give
21 conclusive effect to the earlier denials of petitioner's I-130 petitions but instead, made a decision
22 based on the whole record, as discussed above.

23 Third, the Court is not persuaded by Plaintiff's assertion at oral argument that the alleged
24 coercion of the petitioner's admission in connection with the First I-130 Petition taints the entire
25 process such that the denial of the Third I-130 Petition must be vacated. Even drawing all
26 reasonable inferences in Plaintiff's favor with respect to whether the petitioner's withdrawal of the
27 earlier petition was coerced, Plaintiff has not cited any authority that suggests that where there is
28 ample evidence in the record—apart from any admission made in connection with an earlier

1 withdrawal, coerced or not – that a marriage was fraudulent, a court may not affirm a denial of an I-
2 130 petition by the USCIS on the basis of that evidence only. Although Plaintiff invokes the “fruit
3 of the poisonous tree” doctrine in support of his position, the Court has found no authority
4 suggesting that that doctrine is applicable in this context.

5 Therefore, the Court finds that USCIS’ denial of petitioner’s Third I-130 Petition was not
6 arbitrary and capricious and therefore, that Defendants are entitled to summary judgment motion on
7 Plaintiff’s third, fourth, and fifth claims.

8 **IV. CONCLUSION**

9 For the reasons stated above, Defendants’ Motion is GRANTED and summary judgment is
10 entered as to Claims One through Six. In addition, because Plaintiff’s substantive claims fail, the
11 Court also dismisses his request for Attorneys’ Fees under the EAJA (erroneously labeled “Claim
12 Six”). Plaintiff’s Motion is DENIED.

13

14 IT IS SO ORDERED.

15 Dated: February 8, 2011

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18 JOSEPH C. SPERO
United States Magistrate Judge

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